Remarks

This communication is responsive to the Non-Final Office Action of **April 24, 2009**. Reexamination and reconsideration of the claims is respectfully requested.

Status of Claims

Claims 1, 5-7, 11-13, 17-21, and 25-30 are pending for examination.

Claim 1 is amended herein.

Claims 2-4, 8-12, 14-18, and 20-24 are cancelled.

Claims 1, 7, 13, and 19 are in independent form.

Summary of The Office Action

Claims 1, 7, 13, 19, 29 and 30 were rejected under 35 USC §103(a) as purportedly being unpatentable over Claessens et al (US Patent 7,222,255 B1)(Claessens) in view of Zerlan (US Patent 7,010,295 B1)(Zerlan) and Hou et al. (US Patent 6,901,051 B1)(Hou).

Claims 5, 6, 11, 12, 17, 18, 20, 21, and 25-28 were rejected under 35 USC §103(a) as purportedly being unpatentable over Claessens, Zerlan, and Hou in view of Beverly, IV (US Patent 6,732,182 B1)(Beverly). Claims 11, 12, 17, 18, 20, and 21 have been cancelled.

Response

The Claims Patentably Distinguish Over the References of Record

35 U.S.C. §103

To establish a prima facie case of 35 U.S.C. §103 obviousness, basic criteria must be met. The prior art reference (or references when combined) must teach or suggest all the claim limitations. MPEP 2143(A). Section 2131 of the MPEP recites how "[a] claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). This same standard applies to 103 rejections as evidenced by Section 2143(A) of the MPEP, which reads: "The rationale to support a conclusion that the claim would have been obvious is that **all the claimed elements** were known in the prior art and one skilled in the art could have combined the elements as claimed by known methods with no change in their respective functions."

Additionally, the teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant's disclosure. In re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). This requirement is intended to prevent unacceptable "hindsight reconstruction" where Applicant's invention is recreated from references using the Application as a blueprint.

Here, the criteria for establishing a prima facie case of obviousness are not satisfied since the combination of references does not teach or suggest all the claim limitations. None of the references, alone and/or in combination, teach ***establishing a peak performance rate*** as the highest rate at which packets can be sent from the packet generator to the packet count unit with no packet dropout. Additionally, none of the references teach counting the number of packets received

without examining the contents of the received packets. Thus, none of the independent claims are obvious for at least these reasons. Accordingly, none of the dependent claims are obvious for at least the same reasons.

Peak Performance Rate Is Not Equal to Goodput

The independent claims 1, 7, 13, and 19 all include the element of "establishing a peak performance rate as the highest rate with no packet dropout." None of the references describe this element. The Office Action admits that Claessens and Zerlan, alone and/or in combination, do not teach establishing a peak performance rate. Office Action, page 3. However, the Office Action asserts that Hou discloses a peak performance rate. This assertion is wrong because the Office Action is confusing a goodput measurement disclosed in Hou with the peak performance rate as claimed.

Hou concerns a method for generating network traffic performance metrics. One of the performance metrics discussed in Hou is goodput. Goodput is "the **average amount** of useful data transferred between a specific computing device to another specific computing device." Col. 5, lines 4-6. Useful data refers to data packets that have been transmitted and successfully reach an intended destination without being lost, dropped or re-transmitted. Col. 5, lines 7-11. Therefore, goodput is an average measurement of the expected amount of data transferred without being lost, dropped or re-transmitted.

The claims describe peak performance rate as "the highest rate **with no packet dropout**, or as the maximum receive rate at a particular packet size **with no packet dropout**." Specification, page 6, lines 6-8. Peak performance is a maximum, not an average. Table 1 in the specification on page 12, is a tabulated performance measurement of an example system. As can be seen from Table 1, at a send rate of 15,000 pps, the count in rate starts to deviate from the received rate. It follows that the peak performance rate of this example system, defined to

be the maximum rate at which packets can be transmitted without packet dropout, is 14,000 pps.

One having ordinary skill in the art would recognize that goodput is not the same as a peak performance rate as claimed and described because goodput is an average. To calculate an average, the sum of numbers $a_1 \ldots a_n$ is divided by n. This calculation is not required to determine a peak performance rate. Peak performance is a maximum rate at which packets can be sent without being dropped, lost or re-transmitted. Therefore, none of the independent claims are made obvious by Hou, or the combination of Hou, Claessens, and Zerlan. Accordingly, none of the dependent claims are made obvious by any of the references.

The References Fail to Teach or Suggest Counting Received Packets *Without Examining* the Contents

The references also fail to teach counting received packets ***without examining*** the contents of the received packets. The specification explains on page 10 that in conventional tests, the contents of each packet are inspected to determine the performance level of the system. Claims 1 and 7 describe an improved test that eliminates the need to manually examine the packet contents (e.g., packet number) to determine accurate performance data. Merely the presence of the packet is required to count the received packet and establish the peak performance rate.

The Office Action asserts on page 3 that Claessens teaches counting received packets at column 14, lines 45-50. A thorough analysis of the cited passage shows that the Claessens system requires examining the contents of a received packet. Claessens states that "upon a receipt of each packet, the packet receivers count each received data packets and, further, establishes a record of each received packet." Col. 14, lines 47-50. In order to establish a record of each

received packet, Claessens must examine the contents of the received packet. Claessens states that the packet receiver may use a sequence number specified in each packet to determine and record which packets where lost during transmission. Col. 15, lines 8-12. Further, the packet receiver could determine latency of the network using a time stamp specified in each data packet. Col. 15, lines 12-14. It follows that in order for the packet receiver to retrieve and record information such as the sequence number or the time stamp, the packet receiver must examine the contents of the packet. Therefore, claims 1, 7, and their dependents are not made obvious by Claessens.

Zerlan describes a method for automatic testing of mobile network elements by sending test signals into a network. Although the Office Action does not even assert that Zerlan teaches the claimed counting, careful review of the reference was undertaken and, like Claessens, revealed no teaching of the claimed counting. Thus, claims 1, 7, and their dependents are not made obvious by Zerlan or the combination of Claessens and Zerlan.

Beverly describes a method for generating a packet loss report. Once again, the Office Action does not even assert that Beverly teaches the claimed counting. However, careful review of the reference was undertaken and, like both Claessens and Zerlan, no teaching of the claimed counting was discovered. Beverly describes, in at least column 5, lines 45-50, that "real-time summaries typically consist of 'flows-based' statistics, which detail characteristics of the traffic in terms of protocol distribution, byte volumes, packet volumes, packet sizes, etc." The type of report provided by Beverly describes "which packets were lost and which were out of sequence." Col. 10, lines 41-42. Knowing which packets were lost and which were out of sequence clearly requires examining the contents of a packet, at the very least a packet number identifier. Thus, claims 1, 7, and their dependents are not made obvious by Beverly, or the combination of Beverly, Claessens, and Zerlan.

Conclusion

For the reasons set forth above, the remaining claims are now in condition for allowance. An early allowance of the claims is earnestly solicited.

Respectfully submitted,

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